

## LABOR THROUGH A ROMANIAN TEMPORARY EMPLOYMENT AGENT IN OPPOSITION TO ILLEGAL MIGRATION

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**Abstract.** *The paper addresses a phenomenon generated by the opportunities offered by labor force mobility; Indeed, the advantage of choosing the workplace, the type of work and the salary are expressions of human rights and freedoms, enshrined in international treaties and mentioned in declarations that animate humanity in the idea of a better life; we are talking about a flexible form of work, regulated in Law no. 53/2003 – The labor code applicable on the territory of Romania, which takes place through a temporary work agent, and employment contracts can be concluded whereby the temporary employee is the employee of the temporary work agent, the user of the workforce being the beneficiary of the work provided. The interest in our approach is the phenomenon that can follow such a contract concluded through a temporary work agent, namely the migration of people who, once employed, try and succeed in illegally crossing the borders of our country, wanting to reach European countries with a higher standard of living and a better payment of the labor force - such a phenomenon being also reported in Romania, including in Bihor county, the authorities suspecting people who no longer wish to honor such a labor contract.*

**Keywords:** *work through a temporary employment agent, labor mobility, illegal migration, Romania, Western Europe.*

### 1. Introduction

Freedom of movement as an inalienable human right enshrined in international human rights documents is a natural right that individuals use nowadays and exercise it for different purposes - some simply for cultural, travel or leisure purposes, others - aiming at a more lasting goal such as a better life, a better-paid job, a safer country, finally freedom of movement turning into a choice, practically in the exercise of another right, namely that of settling the residential area, bringing with it the freedom to exercise a profession or trade, to develop one's own person in new economic and social conjunctures; thus, the exercise of a civil and political right can lead to the exercise of economic, social and cultural rights based on the exercise of freedom of movement; the mobility of the person and the labor force is a topical phenomenon of our days, determined by various causes of its dynamics and perpetuation and generating a wider phenomenon, the migration one.

Considered a “societal process of change” (Haruța, 2(43)/2018:34) migration itself involves the departure of a person from the country of origin and settling in another country, referred to as emigration, or on the contrary, the arrival of the person in a foreign country with the aim of settling in it - the meanings being given by the person's sense of

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movement, respectively of leaving a territory or entering another territory; at a restricted territorial level, however, migration can also target the same areas, essential being the movement of the person or groups to reach desired ones.

On the labor market in Romania (in crisis for some sectors, as is the situation in which other countries in Europe are also in, being able to say that the whole of Europe is facing these aspects because the presence of migrant workers is visible) they penetrated legally and foreign workers, whose applications are increasing ([www.inspectiamuncii.ro](http://www.inspectiamuncii.ro)), from emerging countries such as Nepal (Asia, Southwest China), Sri Lanka (Asia, South India, an island state in the Indian Ocean), India, Bangladesh, China, Pakistan, but also the Republic of Moldova or Ukraine, Vietnam, the Philippines, Egypt, etc.; of course, the main reason for this migration is given by the significant difference between the per capita income of the countries from which they leave and those where they want to obtain a work contract. What raises problems, however, are the situations in which foreign workers choose to leave Romania through fraudulent means and try to reach Western European or Central European states aiming for better-paid jobs.

## **2. Regarding the contract through a temporary employment agent and the labor market in Romania with foreign employees**

Central institution of labor law and labor relations, the individual employment contract, as defined in art. 10 of Law no. 53/2003 - The Labor Code<sup>1</sup> is the contract under which a natural person, called an employee, undertakes to perform work for and under the authority of an employer, natural or legal person, in exchange for a remuneration called a salary - this being what it refers to as the legal definition... The specialized legal literature has developed numerous other definitions of the employment contract - this being, for example, "the written agreement between a natural person on the one hand and, as a rule, a unit on the other, by which the former undertakes to performs the work provided for in the contract - fulfilling the duties assigned to him, with respect for discipline and legality, within the unit, which correlatively undertakes to ensure the employed person - appropriate conditions for the smooth running of the activity, full protection and security at work and to remunerates it in relation to the work performed, according to the law and the clauses of the contract" (Ghimpu, 1978: 166 apud Țiclea, Georgescu, 2019: 205).

The work carried out through a temporary work agent is a flexible form of work, as is the work carried out through an individual part-time work contract, regulated by art. 103-107 of the Labor Code, telework regulated by Law no. 81/2018<sup>2</sup> and others. Unlike the individual employment contract in which there are two contracting parties: the employee and the employer, in the contract through a temporary work agent three parties intervene: the temporary work agent, the person who concluded a temporary work contract and the user (the latter). Regarding contracts, in order to validly have an employment contract through a temporary employment agency in Romania, two different agreements must coexist: one concluded between the temporary employment agency and the employee, respectively a provision agreement, concluded between the temporary work agent and the so-called user; (we specify that in order to avoid an inadequate

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<sup>1</sup> Published in M. Of. of Romania, P. I, no. 72 of February 5, 2003, with subsequent amendments and additions.

<sup>2</sup> Published in M. Of. of Romania, P. I, no. 296 of April 2, 2018.

expression, for the term contract we used the term convention as a synonym, both having the same content in the present situation and as in fact they are also considered as such in the legal sciences).

The employment contract through a temporary work agent can only be concluded for the duration of an assignment, which as a rule cannot exceed 24 months, but can be extended for successive periods which, added to the initial duration of the assignment, cannot lead to exceeding a period of 36 months (according to art. 90 par. 1 and 2 of the Labor Code). The specialized literature summarized (Ștefănescu:22) the legal elements of this type of contract in its extension phases assimilating it with an individual employment contract for an indefinite period because in the situation where in the period between two assignments the employee is at the disposition of the temporary work agent, such a contract (for an indefinite period) can also intervene between the parties according to art. 95 para. 2 of the Romanian Labor Code.

Therefore, according to art. 94 of the Labor Code, the temporary employment contract retains the legal characteristics of an individual employment contract (in this sense, as an application and explanation of the rules of Directive no. 2008/104/EC of the European Parliament and of the Council of November 19, 2008 regarding work through a temporary employment agency which mentions the indefinite duration of the individual employment contract concluded with the temporary employment agency - [point 15 of the Preamble and article 5 paragraph 2]. indefinite is regarded as “a framework contract that is realized for each mission, through the fixed-term contract” (Ștefănescu, 2011:22). done because according to the Labor Code - article 84 paragraph 1, the fixed-term employment contract cannot be concluded for a period longer than 36 months). Therefore, it is possible that two individual employment contracts are concluded between the same parties: one temporary for each mission and another for an indefinite duration that produces its effects between two missions (Țiclea, Georgescu, 2019).

It is important to specify that according to art. 2 para. 2 of H.G. no. 1256/2011 regarding the operating conditions, as well as the procedure for authorizing the temporary work agent<sup>3</sup>, with the quality of employees, foreign citizens or stateless persons, domiciled or residing in Romania can be employed by a temporary work agent as employees or of the residence permit for the purpose of work issued/issued according to the law. A foreigner, here referring to the person who has the citizenship of a non-EU state or from outside the European Economic Area or the Swiss Confederation, although through a third country in the sense of O.G. no. 25/2016<sup>4</sup> there have been some changes in the consideration of the notion of a foreigner, in the sense that a person from any state that is not a member of the European Union or the European Economic Area, with the exception of the Swiss Confederation, can be employed in Romania by a single natural or legal person employer; the employer has the obligation to obtain the employment permit for the foreigner who will thus become his employee.

In order to obtain the employment permit, the employer or the beneficiary of the services provision must submit a request to this effect, to the territorial formation of the General Inspectorate for Immigration within the Ministry of Internal Affairs, in this case the Immigration Service of Bihor County. Employment notice, according to art. 2 para.

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<sup>3</sup> Published in M. Of. of Romania, P. I, no. 5 of January 4, 2012.

<sup>4</sup> for modification and completion of some normative acts in the field of foreigners published in M. Of. of Romania, P. I, no. 670 of August 31, 2016.

1 lit. c from O.G. no. 25/2014<sup>5</sup> is that official document issued by the General Inspectorate for Immigration, which certifies the right of an employer to employ a foreigner in a certain position.

According to the Romanian legislation in force, for certain foreigners it is not necessary to obtain an employment permit for employment on the territory of Romania, such as for those foreigners whose free access to the labor market in Romania is established by treaties concluded by our country with other states, or for those who are going to carry out didactic, scientific or other specific categories temporary nature activities in profile institutions accredited or provisionally authorized in Romania, based on bilateral agreements or as holders of a right of temporary residence for carrying out activities of scientific research, and specially qualified personnel, based on the order of the Minister of National Education, as well as foreigners who carry out artistic activities in cultural institutions in Romania, based on the order of the Minister of Culture, according to art. 3 paragraph 2 of O.G. no. 25/2014 regarding the employment and posting of Romanians on the territory of Romania and for the modification and completion of some normative acts regarding the regime of foreigners in Romania and for numerous other categories of foreigners - such as those who are going to carry out temporary activities on the territory of Romania requested by ministries or other authorities of the central or local public administration or autonomous administrative authorities or foreigners holding the right of temporary residence for studies, foreigners holding the right of long-term residence on the territory of Romania, foreigners holding the right of temporary residence for family integration as members family members of a Romanian citizen, foreigners who have acquired a form of protection from our state, asylum seekers - from the date from which they have the right to receive access to the labor market according to Law no. 122/2006<sup>6</sup> regarding asylum in Romania, foreigners possessing an EU Blue Card (by this understanding the identity document, issued to the foreigner by the General Inspectorate for Immigration which certifies his right to stay and work on the territory of Romania as a worker highly qualified), valid, issued by a member state of the European Union, who are going to carry out activities on the territory of Romania for the purpose of work, as a worker, etc.

The temporary employment contract is concluded in written form and as a consequence of the general provisions provided by the Romanian Labor Code: "the individual employment contract is concluded based on the consent of the parties, in written form, in the Romanian language, at the latest on the day before the start of the work activity to the employee. The obligation to conclude the individual employment contract in written form rests with the employer" - art. 16 para. 1.

It is important to remember that a trial period can also be established for the temporary employment contract - only one - this time, unlike the individual employment contract, its duration being entered in the Labor Code, the number of trial days varying by function of the period for which it will be concluded, respectively 2 working days for a contract of less than or equal to one month in duration, 5 working days when the contract will be between one month and 3 months, 15 working days for the contract that will be concluded for a duration of a minimum of 3 months and a maximum of 6 months, 20 working days for the temporary employment contract that will be concluded for a period longer than 6 months and 30 working days in the case of employees in

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<sup>5</sup> Published in M. Of. of Romania P I, no. 640 of August 30, 2014.

<sup>6</sup> Published in M. Of. of Romania, P. I no. 428 of May 18, 2006.

management positions, for the duration of the contract temporary work for more than 6 months. We specify that for the trial period in the case of the contract through a temporary work agent, the same rules apply as in the case of a trial period regarding a potential individual employment contract, respectively: during the trial period the employee enjoys all rights and has all the obligations provided for in the labor legislation, in the applicable collective labor agreement, in the internal regulations, as well as in the temporary employment contract, and the respective period constitutes seniority. During or at the end of the trial period, the contract can be terminated only by a written notice, at the initiative of any of the parties and without the need to give reasons - according to art. 31 para. 3 of the Romanian Labor Code.

On the other hand, the provisions of art. 3<sup>1</sup> of the O.G. no. 25/2014 regarding the employment and secondment of Romanians on the territory of Romania and for the amendment and completion of some normative acts regarding the regime of foreigners in Romania<sup>7</sup> provide that the employer has the obligation to conclude the individual employment contract within 15 working days from the entry of the foreigner into the Romanian territory, or, as the case may be, from obtaining a new employment permit, in the case of a long-stay visa for employment. We appreciate that there are rare cases when the temporary employment contract is terminated due to professional incompetence, since, on the one hand, the employer, a legal person, authorized natural person or sole proprietorship, actually carries out activities on the territory of Romania compatible with the position for which he requests the employment of the foreigner, and the foreigner whom the employer intends to employ, through the CV and any certificates/diplomas of professional competence, meets the conditions provided for in art. 6 para. 1 lit. a), e), g) and h), art. 11 and art. 27 para. 3 lit. c) and e) from O.G. no. 194/2002 republished, with subsequent amendments and additions, and is not in any of the cases of refusal to enter Romania (among the situations listed, we exemplify the fact that the name of the foreigner who is to conclude a temporary employment contract must not be entered in the The Schengen information system for the purpose of refusing entry, also the foreigner must not present a danger to national defense and security, public order and health, not have entered the territory of Romania on the basis of false documents or information, not have attempted or succeeded to illegally introduce other foreigners into Romania or not to have facilitated their accommodation or transport, not to have tried to cross the state border illegally or not to have respected the stated purpose when entering our country or violated the provisions regarding employment; also on the foreigner's name must not have been entered into the visa refusal alert in the Integrated Information System for Migration and Asylum Management, nor must the foreigner have been definitively convicted of crimes he committed abroad, incompatible with the purpose for which he applied the granting of the visa - in relation to these violations, the Romanian state will deal with the foreigner and communicate the decision to return him to the country from which he arrived - according to the provisions of O.G. no. 25/2014<sup>8</sup>, of course if other acts that he may have committed on Romanian territory are not in question; as a result of these violations of the normative provisions, the individual employment contracts concluded by foreigners with legal residence Romanian territory are suspended by law from the date on which the employer is aware of the fact that the General Inspectorate for Immigration has established the obligation to return the foreigner in question

<sup>7</sup> Published in M. Of. of Romania P I, no. 640 of August 30, 2014.

<sup>8</sup> Published in M. Of. of Romania P I, no. 640 of August 30, 2014.

according to the provisions G.E.O. no. 194/2002, republished, with subsequent amendments and additions. The General Inspectorate for Immigration informs the employer of a foreigner in writing about the establishment of the obligation to return him, within a maximum of 10 days from the disposition of the respective measure.

### **3. Work dynamics through temporary employment agent**

For Romania, the sectors of activity lacking for certain qualifications and in which foreign labor is employed are those that involve physical work such as construction, the manufacturing industry, courier services, HoReCa, but also in sanitation, waste management; according to the rules in force, the issuance of the employment permit for permanent, foreign workers is granted only under the condition that the employer has submitted due diligence for the occupation of the job (vacant) by a Romanian citizen, by a citizen of another member state of the Union of the European Union or the European Economic Area, by a citizen of the Swiss Confederation or by a foreigner holding the right of long-term residence of Romanian territory (according to art. 7 para. 2 letter a of O.G. no. 25/2014<sup>9</sup>); the employer, in order to prove the efforts made to hire the previously mentioned workforce, must prove to the General Inspectorate for Immigration that he has published through the mass media the intention to hire staff for the vacant job; the rules in force also assume certain taxes that the employer or the beneficiary of the provision of services must pay, (taxes that are forbidden to be included in the temporary employment contract as an obligation of the employee) including being up to date with the obligations to the state budget and, among other conditions that must be met at the time of application in the case of permanent / seasonal / trainee / cross-border / highly qualified / au pair / seconded / ITC (information and communication technology) workers - is that of not having been sanctioned in the last 6 months for undeclared or illegal work.

Indeed, the lack of labor force in our country has led to the difficulty of carrying out activities by economic agents, also accentuated by the unfavorable situation created since 2019 by the Covid-19 pandemic, a fact that also led to these labor force employment solutions foreign work – by citizens (who are not members of the European Union or the European Economic Area, with the exception of the Swiss Confederation) or stateless persons whose earnings in their states or areas of residence are modest, not to say insignificant compared to the possibilities of payment from Romania. Thus, the creation of a legitimate framework for the labor market and for foreigners did not stick to Romanian workers and did not generate competition, since they did not show interest in the vacant jobs (economic agents proving, moreover, that they do not they can hire Romanian workforce, thus having to call on foreign citizens or stateless persons).

For the labor market in Romania, we observe an increasing trend in the demand and supply of work for foreigners, starting from the year 2021 when the quota of newly admitted foreign workers was 50,000 for it to increase and maintain at 100,000 in the years following. We specify that according to H.G. no. 1338/2023 regarding the establishment of the quota of newly admitted foreign workers on the labor market in 2024<sup>10</sup>. The Government of Romania also established a quota of 100,000 newly admitted foreign workers, as well as for the year 2023; we reiterate that through H.G. no.

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<sup>9</sup> Published in M. Of. of Romania P I, no. 640 of August 30, 2014.

<sup>10</sup> Published in M. Of. of Romania, P. I, no. 7 of 01/04/2024.

1448/2022<sup>11</sup> it was established that a contingent of 100,000 foreign workers (newly admitted to the labor market) could enter our country.

According to government data, by mid-September 2022, the General Inspectorate for Immigration had issued a number of 64,894 employment permits and had almost 9,000 permit issuance requests in processing by the end of 2022.

For the year 2023, until October 9, 2023, the General Inspectorate for Immigration had issued 80,375 employment or posting notices and more than 9,700 requests were being processed for the current year (2024). The number of workers newly admitted to the labor market for the deficit sectors was 50,000 workers for the year 2021. We also note that in 2021 a number of 49,954 employment / secondment notices were issued and for the year 2022 a number of 108,895 such notices were issued, practically doubling the quota being justified by what was expected to be necessary.

Another party involved in the temporary work relationship is the temporary work agent, being that legal entity, authorized by the Ministry of Labor and Social Solidarity “that concludes temporary work contracts with temporary employees, to make them available to the user, to work for the established period of the provision contract under his supervision and management. The operating conditions of the temporary work agent as well as the authorization procedure are established by the Government's decision” (art. 3 of H.G. no. 1256/2011 regarding the operating conditions, as well as the authorization procedure of the temporary work agent<sup>12</sup>).

We specify that the Romanian legislation regarding work through a temporary employment agency is also a transposition of the European one, namely Directive 2002/14/CE of the European Parliament and of the Council of November 19, 2008<sup>13</sup>; certain inconsistencies (Țiclea, Georgescu, 2019) exist between the two categories of norms, however, for example the European norm allowing a temporary work agent to be a natural person and not just a legal entity; what further differentiates the European conditions from the Romanian ones, they concern the status of the person performing the work, respectively the Labor Code uses the notion of temporary employee while the European one uses the term temporary worker, with a more general meaning. The differences between the terms temporary employee and temporary worker include the difference in the existence not only of any employment contract but also of the development of employment relationships - “which have a different source than such a contract” (Țiclea, Georgescu, 2019 :211), and the notion of worker must be interpreted on the basis of Community law, in an extensive way as ruled by the Luxembourg Court of Justice (Țiclea, Georgescu, 2019).

At the national level, the Ministry of Labor and Social Security currently has on record ([www.mmuncii.ro](http://www.mmuncii.ro)) in the “National Register of Authorized Temporary Work Agents” a number of 1,658 temporary work agents, 25 of them working for unlimited period, but a percentage of approximately 45% of them had their operating authorization withdrawn or expired and they did not renew it, the rest carrying out their activity, being active.

We specify that also at the level of Bihor county there are in the records of the Ministry of Labor and Social Security a number of 39 companies registered as temporary work agents, not all of them operating, some suspending their activity, it is certain that a

<sup>11</sup> Published in M. Of. of Romania, P. I, no. 1186 of 01.4.2024.

<sup>12</sup> Published in M. Of. of Romania, P. I, no. 5 of January 4, 2012.

<sup>13</sup> Published in J.O. of the European Communities no. L 327 of December 5, 2008.

number of 16 entities are active on the labor market, most of them being limited liability companies, which also operate with work points in different locations and localities, which in itself reflects a mobility of activities adapted to the requirements of the labor market.

As a social fact in Romania, the presence of foreign workers came to support economic agents, it was a quick solution, at least partially, to the labor force deficit; the solution found and supported by the government is an option for Romanian employers who are looking for labor and not only for them, foreign employees can also be employed in the budget sector or in the public-private sector. However, for many reasons, which are not the subject of this paper, we list some such as cultural differences, not adapting to a foreign country, loneliness, lack of family, friends, etc. can influence the behavior of foreigners who come to work in Romania, being even reported in the national or local mass media regarding coexistence incidents. Also, even among the foreigners who legally arrived in Romania, there are also people who are tempted to arrive in European states where the salary is better and often the police authorities manage to catch them in their attempts to fraudulently cross the country's borders; in other cases there is also the situation of foreigners whose temporary employment contract has expired and they remain illegally staying in Romania or arrived illegally in the area: for example, for the year 2023 the competent police bodies participated in 408 activities following who discovered that 31 foreign citizens were staying illegally in Bihor. ... the most numerous being originating from Bangladesh (12), Pakistan (6) and Sri Lanka (3). (Sim, 2024); these problematic aspects exist, they are even provided for and sanctioned by specific legislation and norms; of course, this relatively newly appeared activity in Romanian economy also presents syncope on the part of Romanian employers, either temporary work agents or employers, as sanctions are also imposed on them.

#### 4. Conclusions

Of course, there are also foreign employees who are delighted by Romania, with the job for which they managed to conclude a contract even for a limited period of time, but we still have to take into account the phenomenon of illegal migration that happens in parallel and subsidiary with that form of employment through a temporary work agent, since the temptation of a better and perhaps easier life can exist and lead to acts that violate the rules in force. The demand and supply for foreign labor has also increased in Romania and the phenomenon of legal as well as illegal migration must to be followed!

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